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9 *Attorneys for Plaintiff* ABANTE ROOTER  
10 AND PLUMBING, INC. and the alleged Class

11  
12 **UNITED STATES DISTRICT COURT**  
13  
14 **NORTHERN DISTRICT OF CALIFORNIA**  
15  
16 **OAKLAND DIVISION**

17 **ABANTE ROOTER AND PLUMBING,**  
18 **INC.**, a California corporation, individually  
19 and on behalf of all others similarly situated,

20 Plaintiff,

21 v.

22 **UNLOCKED BUSINESS STRATEGIES,**  
23 **INC.**, a New York corporation, and  
24 **THOMAS R. COSTA**, an individual,

25 Defendant.

Case No. 4:19-cv-07966-JST

**FIRST AMENDED CLASS ACTION  
COMPLAINT**

**JURY TRIAL DEMANDED**

26 Plaintiff Abante Rooter and Plumbing, Inc. (“Abante” or “Plaintiff”) brings this Class  
27 Action Complaint and Demand for Jury Trial (“Complaint”) against Defendant Unlocked  
28 Business Strategies, Inc. (“UBS”) and Defendant Thomas R. Costa (“Costa”) (collectively the  
“Defendants”) to stop Defendants’ practice of placing auto-dialed calls to cellphone owners and  
to obtain redress for all persons injured by Defendants’ conduct.

Plaintiff, for its Complaint, alleges as follows upon personal knowledge as to itself and its  
own acts and experiences, and, as to all other matters, upon information and belief, including

1 investigation conducted by its attorneys.

2 **JURISDICTION & VENUE**

3 1. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §  
4 1331, as the action arises under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*,  
5 (“TCPA” or the “Act”) a federal statute. The Court also has jurisdiction under the Class Action  
6 Fairness Act, 28 U.S.C. § 1332 (“CAFA”). The alleged Class consists of over 100 persons, there  
7 is minimal diversity, and the claims of the class members, when aggregated together, exceed \$5  
8 million. Further, none of the exceptions to CAFA applies.

9 2. This Court has personal jurisdiction over Defendant UBS and Defendant Costa  
10 because, on information and belief, Defendants have solicited and entered into business contracts  
11 in this District, and they made the calls at issue in this case and directed such calls to cellphone  
12 owners in this District.

13 3. Venue is proper pursuant to 28 U.S.C. § 1391(b) because Plaintiff received the  
14 unlawful calls in this District and the calls were directed to persons residing, at least in part, in  
15 this District.

16 **PARTIES**

17 4. Plaintiff Abante is a plumbing company headquartered in Emeryville, which is  
18 located in Alameda County, California.

19 5. Defendant UBS is a corporation incorporated and existing under the laws of the  
20 State of New York whose official address is 32 Crane Neck Road, East Setauket, New York,  
21 11733, and whose corporate headquarters is located at 1211 Stewart Ave, Bethpage, NY 11714.

22 6. Defendant Thomas R. Costa is a resident of the State of New York. Defendant  
23 Costa is the Chief Executive Officer of Defendant UBS.

24 **COMMON FACTUAL ALLEGATIONS**

25 7. Defendant UBS is a telemarketer that targets consumers and businesses for its  
26 point of sale (hereafter referred to as “POS”) and merchant processing systems, i.e., credit card  
27

1 scanners and other point of sale systems that businesses can use to accept credit and debit card  
2 payments.

3 8. On information and belief, Defendant Costa, at all times relevant to this  
4 Complaint, oversaw, controlled, and directed all actions of UBS, including the placement of the  
5 unsolicited telemarketing calls at issue in this case.

6 9. Defendants place telemarketing calls to solicit sales of POS systems from national  
7 merchant payment processors like First Data and TSYS.

8 10. All of the calls at issue in this case were made on behalf of, for the benefit of, and  
9 with the knowledge and approval of the Defendants. To the extent any of Defendant's agents  
10 made the calls, the calls were made on Defendants' behalf and with their knowledge and approval  
11 and for their benefit. Defendants knew or should have known the calls were unsolicited yet  
12 Defendants accepted the benefits of the calls.

13 11. Unfortunately for consumers, Defendants, in an attempt to secure new leads that it  
14 could then redirect to the large payment system operators, engaged in an aggressive telemarketing  
15 campaign that repeatedly makes unsolicited autodialed and/or prerecorded calls to consumers'  
16 telephones including cellular telephones all without any prior express consent—often stepping  
17 outside the law in the process.

18 12. Specifically, on information and belief, Defendants use an automatic telephone  
19 dialing system ("ATDS"), to make unsolicited telemarketing calls to cellphone numbers. This  
20 equipment had the capacity to store and dial numbers from a list.

21 13. While such calls to landlines may be permitted under the Act, it is a plain violation  
22 of the TCPA, 47 U.S.C. § 227, *et seq.* to make such calls to cellphones without first obtaining  
23 prior express consent.

24 14. Rather than adhere to the requisite rules regarding obtaining consent prior to  
25 engaging in telemarketing, Defendants place repeated calls to consumers who have never  
26 provided consent (either orally or in writing) to receive such calls.

1           15. By making unauthorized telemarketing calls as alleged herein, Defendants have  
2 caused consumers actual harm. This includes the aggravation, nuisance and invasions of privacy  
3 that result from the placement and receipt of such calls in addition to the wear and tear on their  
4 telephones, consumption of battery life, lost ability to place outgoing calls and other interruption  
5 in use, cellular minutes, loss of value realized for the monies consumers paid to their carriers for  
6 the receipt of such calls, and other diminished use, enjoyment, value, and utility of their  
7 cellphones and cellphone plans.

8           16. Furthermore, Defendants made the calls knowing that the calls trespassed against  
9 and interfered with Plaintiff and the other class members' use and enjoyment of, and the ability to  
10 access, their cellphones, including the related data, software, applications, and hardware  
11 components.

12           17. Defendants knowingly made, and continue to make, repeated autodialed  
13 telemarketing calls to cellphone owners without the prior express consent of the recipients. As  
14 such, Defendants not only invaded the personal privacy of Plaintiff and members of the putative  
15 Class, they also intentionally and repeatedly violated the TCPA.

16           18. The calls were made by or on Defendants' behalf and with their knowledge and  
17 approval. Defendants knew about the calls, received the benefits of the calls, directed that the  
18 calls be made, and/or ratified the making of the calls.

19           19. The TCPA was enacted to protect consumers from unsolicited telephone calls like  
20 those alleged in this case. In response to Defendants' unlawful conduct, Plaintiff files the instant  
21 lawsuit and seeks an injunction requiring Defendants to cease all unsolicited telephone calling  
22 activities to consumers as complained of herein and an award of statutory damages to the  
23 members of the Class, together with costs and reasonable attorneys' fees.

24                           **FACTS SPECIFIC TO PLAINTIFF ABANTE**

25           20. Plaintiff Abante is the owner and customary user of a cellphone numbers ending in  
26 1080 and 7210.

1           21. At no time did Plaintiff ever provide its cellphone numbers to Defendants or  
2 provide Defendants, or any of Defendants' agents, with prior express consent to call.

3           22. Plaintiff Abante received unsolicited calls from Defendants on:

4           a. 8/27/2019 auto dialed call from caller ID 888-824-6643 to Cell xxx-xxx-  
5 1080. Abante stated that it was not interested. Defendants called three  
6 different times on this date.

7           b. 8/28/2019 auto dialed call from caller ID 888-824-6643 to Cell xxx-xxx-  
8 1080. Abante's agent again stated it was not interested;

9           c. 8/28/2019 auto dialed from caller ID 888-824-6643 to Cell xxx-xxx-7210.  
10 Abante spoke to someone and an email was received after the call.

11           23. Plaintiff's agent heard a pause and a click when it answered the calls, indicative of  
12 an ATDS.

13           24. All of the calls were made by Defendants' agents or employees at the direction and  
14 oversight of the Defendants. Defendants knew about, directed, ratified, and benefitted from the  
15 calls.

16           25. Prior to receiving the above-referenced calls, Plaintiff had no relationship with  
17 Defendants, had never provided its telephone numbers directly to Defendants, and had never  
18 requested that Defendants place calls to it or to offer it any services. Simply put, Plaintiff has  
19 never provided any form of prior express consent to Defendants to place telemarketing calls to its  
20 phone number and has no business relationship with Defendants.

21           26. Defendants were, and still are, aware that the above-described telemarketing calls  
22 were made to consumers like Plaintiff who never provided prior express consent to receive them.

23           27. Defendant Costa is the chief executive officer of UBS. Costa controls the day-to-  
24 day operations of UBS.

25           28. On information and belief, Defendant Costa has personal liability for the calls  
26 allegedly made herein because he personally oversaw, directed, and executed the telemarketing  
27

1 and unauthorized solicitation campaign at issue. All calls were made with Costa's oversight for  
2 the express benefit of the Defendants.

3 29. Moreover, on information and belief, Costa was responsible for creating,  
4 implementing, and enforcing policies and procedures to ensure comply with the TCPA.  
5 Consequently, Defendant Costa's failure to implement policies and procedures to avoid violations  
6 of the TCPA further establishes his personal liability.

7 30. By making unsolicited calls as alleged herein, Defendants have caused Plaintiff  
8 and members of the Class actual harm. This includes the aggravation, nuisance, and invasions of  
9 privacy that result from the placement of such calls, in addition to the wear and tear on their  
10 cellphones, interference with the use of their phones, consumption of battery life, loss of value  
11 realized for monies consumers paid to their wireless carriers for the receipt of such calls, and the  
12 diminished use, enjoyment, value, and utility of their telephone plans. Furthermore, Defendants  
13 made the calls knowing they trespassed against and interfered with Plaintiff and the other Class  
14 members' use and enjoyment of, and the ability to access, their phones, including the related data,  
15 software, and hardware components.

16 31. To redress these injuries, Plaintiff, on behalf of itself and a Class of similarly  
17 situated individuals, brings this suit under the TCPA, which prohibits unsolicited telemarketing  
18 calls to cellular telephones. On behalf of the Class, Plaintiff seeks an injunction requiring  
19 Defendants to cease all unauthorized calling activities and an award of statutory damages to the  
20 class members, together with costs, pre- and post-judgment interest, and reasonable attorneys'  
21 fees.

## 22 CLASS ACTION ALLEGATIONS

23 32. Plaintiff bring this action in accordance with Federal Rule of Civil Procedure  
24 23(b)(2) and Rule 23(b)(3) on behalf of itself and the following Class defined as follows:

25 **Autodialed Cellphone Class:** All persons in the United States who (1) from the  
26 date four years prior to the filing of this Complaint through the date notice is sent  
27 to the Class; (2) Defendants caused to be called; (3) on the person's cellphone; (4)  
for the same purpose as Defendants called Plaintiff, including for the potential

1 purpose of selling Defendants' products; (5) using the same equipment that was  
2 used to call the Plaintiff, and (6) for whom Defendants claims they obtained prior  
express consent in the same manner as Defendants claims they obtained any prior  
express consent to call the Plaintiff.

3 33. The following people are excluded from the Class: (1) any Judge or Magistrate  
4 presiding over this action and members of their families; (2) Defendants, Defendants'  
5 subsidiaries, parents, successors, predecessors, and any entity in which the Defendants or their  
6 parents have a controlling interest and their current or former employees, officers and directors;  
7 (3) persons who properly execute and file a timely request for exclusion from the Class; (4)  
8 persons whose claims in this matter have been finally adjudicated on the merits or otherwise  
9 released; (5) Plaintiff's counsel and Defendants' counsel; and (6) the legal representatives,  
10 successors, and assignees of any such excluded persons. Plaintiff anticipate the need to amend the  
11 class definitions following a period of appropriate discovery regarding the type of equipment use,  
12 the purpose of the calls, any consent obtained, and any third party on whose behalf the calls were  
13 made.

14 34. **Numerosity:** The exact number of members within the Class is unknown and not  
15 available to Plaintiff at this time, but individual joinder is impracticable. On information and  
16 belief, Defendants have placed telemarketing calls to thousands of consumers who fall into the  
17 defined Class. The number of members of the Class and class membership can be identified  
18 through objective criteria, including Defendants' phone records and dialer reports.

19 35. **Typicality:** Plaintiff's claims are typical of the claims of other members of the  
20 Class in that Plaintiff and the members of the Class sustained the same legal injuries and damages  
21 arising out of Defendants' uniform wrongful conduct. If Plaintiff has an entitlement to relief, so  
22 do the rest of the Class Members.

23 36. **Adequate Representation:** Plaintiff will fairly and adequately represent and  
24 protect the interests of the Class and has retained counsel competent and experienced in complex  
25 class actions, including class actions under the TCPA. Neither Plaintiff nor her counsel has any  
26 interest in conflict with or antagonistic to those of the Class, and Defendants have no defenses  
27  
28

1 unique to Plaintiff.

2 37. **Commonality and Predominance:** There are questions of law and fact common  
3 to the claims of Plaintiff and the Class, and those questions will drive the litigation and  
4 predominate over any questions that may affect individual members of the Class. Common  
5 questions for the Class include, but are not necessarily limited to the following:

6 (a) Whether Defendants' conduct violated the TCPA;

7 (b) Whether the calls were made by or on behalf of Defendants and/or whether  
8 Defendants knew about, approved, or benefitted from the calls;

9 (c) Whether Defendants had prior express consent to place the calls;

10 (d) Whether the calls were made using an ATDS; and

11 (e) Whether Defendants' conduct was willful or knowing such that members  
12 of the Class are entitled to treble damages.

13 38. **Conduct Similar Towards All Class Members:** By committing the acts set forth  
14 in this pleading, Defendants have acted or refused to act on grounds substantially similar towards  
15 all members of the Class so as to render certification of the Class for final injunctive relief and  
16 corresponding declaratory relief appropriate under Rule 23(b)(2).

17 39. **Superiority & Manageability:** This case is also appropriate for class certification  
18 because class proceedings are superior to all other available methods for the fair and efficient  
19 adjudication of this controversy. Joinder of all parties is impracticable, and the damages suffered  
20 by the individual members of the Class will likely be relatively small, especially given the burden  
21 and expense of individual prosecution of the complex litigation necessitated by Defendants'  
22 actions. Thus, it would be virtually impossible for the individual members of the Class to obtain  
23 effective relief from Defendants' misconduct. Even if members of the Class could sustain such  
24 individual litigation, it would still not be preferable to a class action, because individual litigation  
25 would increase the delay and expense to all parties due to the complex legal and factual  
26 controversies presented in this Complaint. By contrast, a class action presents far fewer  
27  
28



management difficulties and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single Court. Economies of time, effort and expense will be fostered, and uniformity of decisions ensured. Also, there are no pending governmental actions against Defendant for the same conduct.

**CAUSE OF ACTION**

**Violation of 47 U.S.C. § 227, *et seq.***

**(On behalf of Plaintiff and the Autodialed Cellphone Class)**

40. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

41. Defendants made or caused to be made calls to Plaintiff's and the other Class Members' cellphones.

42. These calls were made using equipment that had the capacity to store or produce telephone numbers using a random or sequential number generator, to receive and store lists of phone numbers, and to dial such numbers, *en masse*, without human intervention. The telephone dialing equipment utilized by Defendants had functionality akin to a predictive dialer, stored dialed numbers from a list, dialed random numbers, dialed with minimal human intervention, and/or dialed numbers predictively from a database of non-randomized telephone numbers, in an automatic and systematic manner. Defendants' autodialer disseminated information *en masse* to Plaintiff and other consumers and is an ATDS under the TCPA.

43. Defendants violated the TCPA by making calls using an ATDS to Plaintiff's and other class members' cell phones.

44. The calls were for telemarketing purposes, specifically to apprise Plaintiff and others of the availability of health insurance products and plans and to sell such plans to Plaintiff and others.

45. On information and belief, Defendant Costa personally oversaw, directed, and executed the telemarketing campaign that placed the calls at issue.

46. Neither Plaintiff nor any other consumer ever provided prior express written or oral consent under the TCPA to be called by or on behalf of Defendants.

1           47.     At no time did Plaintiff provide written consent indicating that Plaintiff agreed to  
2 be called using autodialing equipment or informing Plaintiff that consent was not a condition of  
3 purchase for any goods or services.

4           48.     Likewise, neither Plaintiff nor any other consumer ever had an existing business  
5 relationship with UBS.

6           49.     As a result of Defendants' unlawful conduct, Plaintiff and the other members of  
7 the Class suffered actual damages and, under section 47 U.S.C. § 227(c)(5), Plaintiff and each  
8 member of the Class are each entitled to receive up to \$500 in damages for each violation of 47  
9 C.F.R. § 64.1200.

10          50.     Should the Court determine that Defendants' conduct was willful and knowing, the  
11 Court may, pursuant to Section 227(c)(5), treble the amount of statutory damages recoverable by  
12 Plaintiff and the other members of the Class.

13          51.     Plaintiff and the class members are also entitled to incidental injunctive relief and  
14 corresponding declaratory relief as necessary to prevent their future receipt of Defendants'  
15 unlawful calls.

#### 16                                   **PRAYER FOR RELIEF**

17           **WHEREFORE**, Plaintiff, on behalf of itself and the Class, pray for the following relief:

- 18           A.     An order certifying the Class as defined above, appointing Plaintiff as the  
19                 representative of the Class, and appointing its counsel as Class Counsel;
- 20           B.     An order declaring that Defendants' actions, as set out above, violate the TCPA;
- 21           C.     An injunction requiring Defendant UBS to cease all telemarketing calls made  
22                 using an ATDS to cellphones, without first obtaining prior express consent to call;
- 23           D.     An award of actual monetary loss from such violations or the sum of five hundred  
24                 dollars (\$500.00) for each violation, whichever is greater all to be paid into a  
25                 common fund for the benefit of the Plaintiff and the Class Members;
- 26           E.     An award of trebled damages if willful or knowing violations are shown;

- 1 F. An award of reasonable attorneys' fees and costs to be paid out of the common  
2 fund prayed for above;
- 3 G. An award of pre- and post-judgment interest; and
- 4 H. Such other and further relief that the Court deems reasonable and just.

5 **JURY DEMAND**

6 Plaintiff requests a trial by jury of all claims that can be so tried.

7  
8 Dated: February 17, 2020

**Abante Rooter and Plumbing**, individually and on  
behalf of all others similarly situated,

9 By: /s/ Taylor T. Smith  
10 One of Plaintiff's Attorneys

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27 *Counsel for Plaintiff and the Putative Class*  
28 \*pro hac vice application to be filed